(4)

No. 99-449

Supreme Court, U.S.
FILED
NOV 26 1999
CLERK

IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—against—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

WILLIAM M. BROOKS
(*Counsel of Record*)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331

10 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
REASONS FOR GRANTING THE WRIT	3
I. THE DECISIONS OF THE CIRCUIT COURTS ARE OF QUESTIONABLE AUTHORITY AS TO REQUIRE A RESOLUTION OF THE ISSUE AT HAND BY THIS COURT	3
II. THE AVAILABILITY OF STATE LAW REMEDIES DOES NOT RENDER § 1983 CLAIMS UNNECESSARY	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	PAGE
Addington v. Texas, 441 U.S. 418 (1979)	3
Allen v. Illinois, 478 U.S. 364 (1986)	3
Bailey v. Woel, 485 A. 2d 265, 268 (Md. 1984)	5
Blum v. Yaretsky, 457 U.S. 991 (1982)	6
DeShaney v. Winnebago County, 489 U.S. 189 (1989)	6
Ellison v. Garbarino, 48 F. 3d 192 (6th Cir. 1995)	4
Felder v. Casey, 487 U.S. 131 (1988)	5
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)	4
Foucha v. Louisiana, 504 U.S. 71 (1992)	3
Goetz v. Crosson, 967 F. 2d 29 (2d Cir. 1992)	3
Gordon v. Higgs, 716 F. Supp. 1351 (D. Nev. 1989)	5
Griffin v. Maryland, 378 U.S. 130 (1963)	4
Heller v. Doe by Doe, 509 U.S. 312 (1993)	3
Jackson v. Indiana, 406 U.S. 715 (1972)	2
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	2
Jones v. United States, 463 U.S. 354 (1983)	3
National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988)	4
O'Connor v. Donaldson, 422 U.S. 563 (1975)	2-3, 7
Parham v. J.R., 442 U.S. 584 (1979)	3

PAGE

Project Release v. Prevost, 722 F. 2d 960 (2d Cir. 1983) 7

Rockwell v. Cape Cod Hospital, 26 F. 3d 254 (1st Cir. 1994)..... 2, 4

Sherlock v. Montefiore Medical Center, 84 F. 3d 522 (2d Cir. 1996) 6

Smith v. Allwright, 321 U.S. 649 (1944)..... 2

Spencer v. Lee, 864 F. 2d 1376 (7th Cir. 1989) (en banc) 2, 4

Suffolk Parents of Handicapped Adults v. Wingate, 101 F. 3d 818 (2d Cir. 1996)..... 6

United States ex rel. Morgan v. Sielaff, 546 F. 2d 218 (7th Cir. 1976) 5-6

West v. Atkins, 487 U.S. 42 (1988)..... 4

Other Authorities

Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Indiana L. Rev. 937 (1998) 5

Schwartz & Kirklin, *Section 1983 Litigation: Claims and Defenses* (3 ed. 1997) 6

Senate Report No. 99-109, 1986 U.S. Code Cong. and Adm. News 5

IN THE

Supreme Court of the United States

No. 99-449

RHODA OKUNIEFF,

Petitioner,

—against—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

PRELIMINARY STATEMENT

The respondents' Brief in Opposition is particularly noteworthy in that the respondents do not challenge the petitioner's contention that the decision that civil commitment is not state action threatens to deprive many mentally ill individuals of constitutional safeguards generally thought to be

inherent in the civil commitment process. In failing to challenge this contention, the respondents also fail to take issue with the assertion that the trend toward privatization has resulted in significant increases in the number of allegedly mentally ill individuals who are subject to involuntary hospitalizations at private hospitals.

It is also significant that while the respondents assert that civil commitment does not satisfy the public function test, the respondents fail to address the distinction between the performance of a function that both the government and the private sector may undertake, *see, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (provision of utility services), and the exercise of an exclusive state prerogative that the state has delegated to the private sector. *See* Petition for Writ of *Certiorari* at 17-20. The failure of a number of courts to even address, much less recognize, this distinction, *see Rockwell v. Cape Cod Hospital*, 26 F. 3d 254, 259-60 (1st Cir. 1994); *Spencer v. Lee*, 864 F. 2d 1376, 1380-81 (7th Cir. 1989) (en banc), illustrates the need for guidance by this Court.[1]

Rather, the respondents argue, *inter alia,* that the granting of *certiorari* is not warranted because (1) the opinions of the courts below are not inconsistent with prior decisions of this Court because civil commitment does not satisfy any of the state action tests and (2) there is no conflict among the circuit courts. However, the absence of a conflict among the courts of appeals, in and of itself, hardly warrants a denial of *certiorari*. In almost every case involving the constitutional rights of institutionalized mentally disabled individuals pertaining to their confinement in which this Court granted *certiorari*, there was no conflict among the circuits. *See Jackson v. Indiana,* 406 U.S. 715 (1972); *O'Connor v. Donaldson,* 422

[1] This Court's resolution of the state action issue with election cases conclusively demonstrates that a private entity can perform a function that is an exclusive prerogative of the state and such action remains state action. *See Smith v. Allwright*, 321 U.S. 649, 663 (1944).

U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Jones v. United States*, 463 U.S. 354 (1983); *Allen v. Illinois*, 478 U.S. 364 (1986); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Heller v. Doe by Doe*, 509 U.S. 312 (1993). As in those cases, the issues presented by the petitioners are important and deserve plenary review by this Court.

This brief will first establish that the underpinnings of the circuit court decisions are extremely weak, which warrants scrutiny of this issues by this Court. This brief will then establish that the existence of possible claims under state law for a wrongfully confined mentally ill individual does not render § 1983 claims superfluous.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE CIRCUIT COURTS ARE OF QUESTIONABLE AUTHORITY AS TO REQUIRE A RESOLUTION OF THE ISSUE AT HAND BY THIS COURT.

The respondents err when they assert that the uniformity of decisions by the circuit courts on the issue at hand warrants a denial of *certiorari*. Upon scrutiny, the decisions of the circuit courts that have concluded that the Constitution does not protect against erroneous commitments to private psychiatric hospitals because such commitments are not state action have failed to consider significant state action jurisprudence of this Court. Moreover, wrongful psychiatric commitment is a "horrendous consequence." *Goetz v. Crosson*, 967 F. 2d 29, 39 (2d Cir. 1992) (Newman, J. concurring). Hence, particularly because of the significant individual interests at stake, this Court should conclusively resolve this question.

First, none of these circuit court opinions that have addressed the issue at hand examined the relevance of private physicians having the authority to commit only because state

law provided the mantle of authority. *See National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988); *West v. Atkins*, 487 U.S. 42, 49 (1988); *Griffin v. Maryland*, 378 U.S. 130, 135 (1963). Likewise, with the exception of the court in *Ellison v. Garbarino*, 48 F. 3d 192 (6th Cir. 1995), none of the courts addressed how this Court's state action analysis in *West v. Atkins* impacts on the issue at hand.

Moreover, the court in *Ellison* clearly misinterpreted this Court's decision in *West*. The court in *Ellison* held that *West v. Atkins* did not control because the physician in *West* was contractually bound to the state to provide medical services to prisoners in state custody. 48 F. 3d at 196-197. This interpretation of *West* was clearly wrong. This Court in *West* expressly held state action existed not because of the contractual relationship between the doctor and the State but because of the authority conferred upon the physician to satisfy the State's constitutional mission to provide medical care to those in custody. 487 U.S. at 55.

Finally, the public function analysis by a number of circuit courts is highly questionable. Not only did the courts fail to distinguish between the performance of a public function and the delegation of an exclusive governmental prerogative, *see supra* at 2, but by looking at historical practices in a particular state, *see Rockwell v. Cape Cod Hospital*, 26 F. 3d at 259; *Spencer v. Lee*, 864 F. 2d at 1380, circuit courts ignored this Court's directive to avoid using historical practices of one state to determine a defendant's state action status:

> To rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 162-63 (1978).

II. THE AVAILABILITY OF STATE LAW REMEDIES DOES NOT RENDER § 1983 CLAIMS UNNECESSARY.

Contrary to the assertion of the respondents, the availability of causes of action under state law does not render § 1983 claims unnecessary. First, § 1988 authorizes the provision of attorneys fees in § 1983 actions. Because some mentally ill individuals do not suffer substantial measurable damages as a result of wrongful hospitalization, which may limit the willingness of the private bar to represent aggrieved individuals, the availability of attorneys' fees in civil rights actions pursuant to 42 U.S.C. § 1988 may make the difference between a wrongfully confined person obtaining counsel and not obtaining counsel. *See* Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Indiana L. Rev. 937, 941-42 (1998). This is particularly important because Congress has recognized that many mentally ill individuals suffer violations of their rights when they are confined and should have access to the courts. *See* Senate Report No 99-109, 1986 U.S. Code Cong. and Adm. News, pp. 1368, 1376.

Second, the limitations period governing state law claims may well be shorter than the limitations period governing § 1983 actions. *See* Brooks, *supra* at 941, n.33. Third, while § 1983 actions are not subject under state law to condition precedents to filing lawsuits, such as a notice of claim provision, *see Felder v. Casey*, 487 U.S. 131, 145 (1988); *Gordon v. Higgs*, 716 F. Supp. 1351, 1352 (D. Nev. 1989) (state malpractice screening law did not govern § 1983 medical treatment claim by prisoner), state law claims may be subject to such provisions. *See Bailey v. Woel*, 485 A. 2d 265, 268 (Md. 1984) (dismissal of claim warranted when plaintiff fails to present evidence before a medical malpractice arbitration panel). Because many mentally ill individuals may lack the faculties to deal with the procedural intricacies of litigation, *cf. United States ex rel. Morgan v. Sielaff*, 546 F. 2d 218, 222

(7th Cir. 1976), the existence of condition precedents under state laws may mean the difference between a successful and unsuccessful lawsuit, particularly if aggrieved individuals are unrepresented because § 1983 compensated counsel are unavailable.

Finally, state courts may have more restrictive rules governing such matters as class actions, preliminary injunctions and discovery. *Cf.* Schwartz & Kirklin, *Section 1983 Litigation: Claims and Defenses*, § 1.18 (3 ed. 1997). This may render it more difficult to eliminate systemic abuses that exist in private psychiatric hospitals.

For numerous reasons, the respondents also err when they assert that because private hospitals are subject to extensive government regulation, a determination that they are state actors would result in a holding that all decisions made by physicians in private hospitals are attributable to the state. State regulation does not convert private medical decisions to state action. *See Blum v. Yaretsky*, 457 U.S. 991, 993 (1982). Rather, it is the coercive use of the states' police and *parens patriae* powers that warrant a determination that civil commitment to a private hospital is state action. *See* Petition for *Certiorari* at 14-19.[2] Moreover, a finding that private physicians become state actors when they involuntarily hospitalize a mentally ill person will not convert them into state actors in all situations since a party may be a state actor for some purposes, but not others. *See Sherlock v. Montefiore Medical Center*, 84 F. 3d 522, 527 (2d Cir. 1996).

---

[2] Indeed, it is unlikely that the Constitution governs a consensual doctor-patient relationship in any context. *See DeShaney v. Winnebago County*, 489 U.S. 189, 199-200 (1989) (only "when the State takes a person into its custody and holds him there against his will, [does] the Constitution impose upon it a corresponding duty to assume some responsibility for his safety and well-being"); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F. 3d 818, 823-24 (2d Cir. 1996) (no constitutional obligations to provide services to institutionalized mentally disabled individuals because they were not involuntarily institutionalized).

Finally, the respondents argue that the second prong of any state action question—whether or not there has been a violation of a constitutional right—is not before this Court. The courts below did not address this question because they concluded that state action did not exist because the actions of the respondents were not attributable to the state. *See* Petition for Writ of *Certiorari* at 11a. Any court addressing this question would have little difficulty concluding that the Constitution prohibits the involuntary confinement of a nondangerous individual. *See, e.g., O'Connor v. Donaldson*, 422 U.S. at 576; *Project Release v. Prevost*, 722 F. 2d 960, 971-72 (2d Cir. 1983).

CONCLUSION

For the reasons given in this brief and the Petition for *Certiorari*, this Court should grant this petition for *certiorari*.

Dated: Huntington, New York
November 24, 1999

WILLIAM M. BROOKS
(Counsel of Record)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331